EDITOR'S NOTE

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ORIGINAL

(2)

No. 87-97

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

Richard L. Dugger,

Petitioner,

v.

Robert Theodore Bundy,

Respondent,

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Theodore Robert Bundy, asks leave to file the attached brief in opposition to Petitioner's Petition for writ of certiorari in forma pauperis. Respondent has been granted leave to so proceed in both the U.S. District Court and U.S. Court of Appeals. Respondent, who is incarcerated in a Florida prison, is in the process of preparing an affidavit in support of this motion and will file such affidavit as soon as possible.

James E Coleman AJM

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RESPONDENT'S BRIEF IN OPPOSITION

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August 17, 1987

QUESTIONS PRESENTED

I. Whether Petitioner has demonstrated the extraordinary circumstances necessary to justify this Court's review of an interlocutory order?

II. Whether a habeas petitioner who asserts his past incompetence at trial is required to show "cause" and "prejudice" to lift a state procedural bar raised by his failure to timely assert his incompetence?

III. Whether certiorari should be granted to resolve a factual dispute between a Federal District Court and the court below as to whether the trial record showed a bona fide doubt as to a habeas petitioner's competency to stand trial?

IV. Whether certiorari should be granted to review the Court of Appeals' decision to remand for a hearing on one issue in a habeas petition while retaining jurisdiction over the remaining issues?

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TABLE OF AUTHORITIES

* Cases or authorities chiefly relied upon are marked by asterisks.

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The Petitioner asserts that the jurisdiction of this Court is founded upon 28 U.S.C. S. 1254 (1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth in the Petition for Writ of Certiorari at pp. 3-12.

PRELIMINARY STATEMENT

References to the Petition for Writ of Certiorari will be designated "(Ptn. ___)."

STATEMENT OF THE CASE AND FACTS

In January 1980 Respondent was tried in the Circuit Court of Columbia County, Florida for the abduction and murder of a young Florida girl. Before, during and after his trial Respondent exhibited behavior that should have caused the trial judge to doubt Respondent's competence.[1/] Nevertheless the trial judge did not hold a hearing to determine Respondent's competency to stand trial.[2/]

Respondent appealed his conviction and sentence of death to the Florida Supreme Court which affirmed both. Bundy v. State, 471 So.2d 9 (Fla. 1985), cert. denied, 107 S. Ct. 295 (1986). On November 14, 1986 Respondent filed with the trial court a motion to vacate his conviction and sentence under Fla.

1/ For example, Respondent routinely disregarded the advice of his counsel by engaging in long dialogues with the police that barely skirted confession but produced numerous damaging admissions. He jettisoned a favorable plea bargain by carrying on at the plea bargain hearing in an eccentric and irrational manner. At his capital sentencing he refused to allow the introduction of mitigating evidence and instead acted out before the sentencing jury a mock wedding ceremony with his fiancee. See discussion in Bundy v. Dugger, 816 F.2d 564, 567-68 (11th Cir. 1987).

2/ Six months prior to the beginning of Respondent's trial, however, a hearing on his competency was held in a different proceeding, his trial for the murder of two women students at the Chi Omega sorority house in Tallahasee, Florida. That hearing resulted in a finding that Respondent was competent. The hearing, however, lacked elementary due process safeguards. None of the parties to the hearing attempted to show that Respondent was incompetent and his counsel, who believed him incompetent, was not allowed to testify or otherwise to participate. See Bundy v. Wainwright, 805 F.2d 948 (11th Cir. 1986). Moreover, the earlier hearing could not have established Respondent's competency as of the time of his trial in this case.

R. Crim. P. 3.850 (and West Supp. 1987), the Florida statute governing collateral relief. The motion alleged, inter alia, that Respondent had been tried while incompetent.

After Respondent's motion for collateral relief was denied by the trial court he appealed to the Florida Supreme Court, which held a hearing on November 17, 1986 and denied the appeal. That same day Respondent filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in the Federal District Court for the Middle District of Florida. The Petition, nearly two hundred pages in length and alleging over a dozen claims for relief, was denied by the District Court less than nine hours later.

Among the issues the Petition raised was Respondent's claim that his right to due process of law had been violated by the failure of the trial judge to hold a hearing on Respondent's competence to stand trial. The District Court's denial of this claim rested on its determination that Respondent had "'failed to present sufficient evidence to create a "real, substantial, and legitimate doubt" as to his competence to stand trial and be sentenced.'" Bundy v. Wainwright, No. 86-968, slip op. (M. D. Fla., November 17, 1986) (citations omitted).

Respondent appealed the District Court's denial of the Petition to the Eleventh Circuit. On April 2, 1987, the Court of Appeals issued an opinion reversing the District Court's decision of the competency issue. Bundy v. Dugger, 816 F. 564 (11th Cir. 1987). Acknowledging that the "standard of proof" for Respondent's competency claim was "high," the Court of Appeals concluded that the "strong indicia" of Respondent's incompetence it found in the record nevertheless compelled a hearing on Respondent's competency at trial. Id. at 566-67. It then remanded the

case to the District Court for the limited purpose of holding that hearing and retained jurisdiction over the remainder of the appeal.[3/]

REASONS FOR DENYING THE PETITION

I. PETITIONER FAILS UTTERLY TO DEMONSTRATE THE EXTRAORDINARY CIRCUMSTANCES NECESSARY TO JUSTIFY REVIEW OF THE COURT OF APPEALS' INTERLOCUTORY ORDER.

The instant Petition seeks review of an interlocutory order that set for a hearing a single claim in Respondent's habeas petition. The Court of Appeals' order resulted from its application of well-settled law to an extensive factual record. In asking this Court to redo the Court of Appeals' painstaking analysis, Petitioner willfully ignores the principles governing this Court's exercise of its certiorari jurisdiction.

No difficult legal issues are involved here. Long ago in Pate v. Robinson, 383 U.S. 375 (1966) and then in Drope v. Missouri, 420 U.S. 162 (1975), this Court held that a hearing on a criminal defendant's competency is constitutionally required when sufficient indicia of the defendant's incompetence are known to the trial judge. Respondent's habeas petition alleged a violation of this constitutional right. The District Court, reviewing the lengthy record, found the facts insufficient to generate the need for a hearing. The Court of Appeals, however, found that the same record contained "strong indicia" of the

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3/ Petitioner filed a petition for rehearing in which he asserted that the Court of Appeals had made a critical error in assuming that a part of the record had not been before the District Court when it made its ruling. The Court of Appeals conceded the error but denied the petition, concluding that "there remain[ed] sufficient evidence in the record to require" a competency hearing. Bundy v. Dugger, No. 86-3773, slip op. (11th Cir. May 15, 1987).

defendant's incompetence to stand trial and remanded the case for the hearing required by Pate.

Though Petitioner dresses part of his challenge to the Court of Appeals' action in a novel legal guise, at bottom he simply asks this Court to side with him in his disagreement with the Eleventh Circuit over the proper factual inferences to draw from the record. The resolution of that disagreement implicates none of the considerations that generally guide this Court in the exercise of its discretionary jurisdiction.[4/] Petitioner does not allege that the Eleventh Circuit applied a legal standard that conflicts with that of other Federal Courts. See Rule 17(1)(a), Sup. Ct. R. In fact the Court of Appeals applied the same clear test that other Federal Courts routinely apply in cases such as this. Nor can Petitioner argue that the Court of Appeals' decision conflicts with that of Florida's highest court. Id. The Florida Supreme Court found Respondent's Pate claim barred under state law and did not reach its constitutional merits.[5/] The only conflict the Petition has identified is what he calls the "intra-district conflict" between the District Court and the court below as to whether a hearing is required by the facts. [Ptn. at 31.]

Because Petitioner asserts matters that are important only to the parties in this action, he would have no claim to this Court's attention even if he sought review of a final order. See Rice v. Sioux City Cemetary, 349 U.S. 70, 79 (1955). Here,

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4/ One can doubt whether certiorari would even have been sought in a case involving a habeas petitioner less notorious -- or newsworthy.

5/ Of course Florida's decision not to reach the merits does not conflict with the Court of Appeals' decision to review those same merits since the former is premised on state, and the latter on federal law.

however, Petitioner seeks review of an interlocutory order; he makes no showing that the matters he wishes this Court to review are of "imperative public importance." Rule 18, Sup. Ct. R. In fact the matters raised in this Petition are neither inherently "important," being essentially factual issues confined to this case, nor "imperative," in that they can always be reviewed (if necessary) after the Court of Appeals' final judgment. There is no sensible way to characterize the Court of Appeals' decision to order a hearing in this case as a matter that "require[s] immediate settlement in this Court." Id. Compare United States v. Nixon, 418 U.S. 683 (1974). Even within the narrow compass of Petitioner's own interests, no harm would result from this Court's declining to exercise review until after the Court of Appeals enters final judgment.

II. A HABEAS PETITIONER WHO ASSERTS HIS PAST INCOMPETENCE AT TRIAL IS NOT REQUIRED TO SHOW "CAUSE" AND "PREJUDICE" TO LIFT A STATE PROCEDURAL BAR RAISED BY HIS FAILURE TO TIMELY ASSERT HIS INCOMPETENCE.

Petitioner formulates his initial bid for review in a manner that attempts to obscure his simple disagreement with the Eleventh Circuit's decision of the Pate v. Robinson issue.

Petitioner argues that an incompetent defendant waives his right not to be tried if he fails to assert that right at trial or immediately thereafter.[6/] He cites Wainwright v. Sykes, 433 U.S. 72 (1977) for the proposition that the incompetent defendant must show "cause" and "prejudice" for his failure to assert his own incompetency. Petitioner's novel argument cannot

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6/ The first paragraph of the Petition's discussion sets the tone for the remainder. Petitioner makes, but does not try to document, the serious accusation that the Eleventh Circuit routinely disregards this Court's binding precedents. [Ptn. at 20].

survive this Court's statement in Pate that it is "contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial." 383 U.S. at 384. Petitioner has not cited a single Federal court decision,[7] and Respondent is aware of none, that holds that a post-conviction challenge based on incompetency at trial will be held to have been defaulted by the petitioner's failure to raise it while incompetent.

At most Petitioner seeks a change in the law. But the absurdity, and futility, of the change he suggests becomes apparent when one considers that Petitioner accepts -- as he must -- that a defendant's incompetence is itself sufficient "cause" to satisfy Wainwright. In Petitioner's circular jurisprudence a defendant's right to assert his past incompetency depends upon his having been incompetent. But Petitioner's new criterion adds nothing to the inquiry already required under Pate. A habeas petitioner who shows indicia of past incompetence sufficient to trigger a competency hearing under Pate necessarily satisfies the pointless "cause" hurdle Petitioner seeks to erect.

What Petitioner is really getting at with his invitation to repeat the Pate inquiry becomes evident in his hypothetical discussion of why no "cause" could be shown in this case. He argues that Respondent could not show "cause" for having failed to assert his own incompetency because -- according to Petitioner -- the record is crystal clear that Respondent was competent when tried.[8] Petitioner's logic ignores the fact that

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7/ The sole authority Petitioner cites for his untenable theory is Curry v. Wilson, 405 F.2d 110 (9th Cir. 1968) (incorrectly cited in the Petition as 404 F.2d 110), an inapposite case in which the Ninth Circuit held that a competent defendant was bound by his deliberate decision at trial not to assert a Fifth Amendment claim.

8/ "Bundy therefore cannot establish 'cause' for refusing to raise this issue before (or during) trial and, even if he

[Footnote continued next page]

whether Respondent was or was not competent is the very issue that the Eleventh Circuit has found to require a hearing. Petitioner's question begging cannot resolve this disputed issue here in his favor.[9] His entire "cause" and "prejudice" argument dissolves into simple reiteration of his own opinion as to what the record "really" shows.

III. IT WOULD BE IMPROVIDENT TO GRANT CERTIORARI TO RESOLVE AN "INTRA-DISTRICT" FACTUAL DISPUTE BETWEEN THE DISTRICT COURT AND THE COURT OF APPEALS AS TO WHETHER THE RECORD SHOWS A BONA FIDE DOUBT AS TO RESPONDENT'S COMPETENCY.

Petitioner's second argument similarly disputes the Eleventh Circuit's interpretation of a record that Petitioner contends shows a "sane, lucid, oriented defendant." [Ptn. at 27].

The fact bound[10] nature of Petitioner's disagreement

[Footnote continued from preceding page]

could cannot establish "prejudice" since all examiners found him to be 'competent.'" [Ptn. at 23]

9/ Petitioner persistently bolsters his version of the facts with selective and inaccurate references to the record. For example, he asserts that at the competency hearing in Respondent's companion trial (see Bundy v. Wainwright, 805 F.2d 948 (11th Cir. 1987), "[t]he leading expert, Dr. Cleckly, found Bundy competent. Dr. Tanay [the defense expert] agreed with Cleckly." [Ptn. at 22,23] Actually Dr. Tanay did not agree with Dr. Cleckly that Respondent was competent; to the contrary, he expressed his opinion that Respondent's inability to recognize and act in his own interest showed his likely incompetence. [Transcript of Proceedings before Judge Cowart, June 11, 1978, p. 3638.]

10/ Through gross indifference to, and misrepresentation of, the facts, Petitioner attempts to make it appear that the Court of Appeals was guilty of applying an incorrect legal standard in its review of the District Court's decision. He states that the Eleventh Circuit ordered a hearing despite the "incredibl[e]" fact that it "agreed that [Respondent] failed to produce sufficient evidence generating a legitimate doubt as to his competence.'" [Ptn. at 28, fn. 6] referring to Bundy v. Dugger, 816 F.2d at 566. Had Petitioner only read the next sentence in the opinion he quotes, he would have realized that the sentence he quotes refers to the District Court's finding, a finding the Court of Appeals went on to label "clearly erroneous."

with the court below is apparent in his own interpretation of actions by the Respondent that the Eleventh Circuit found suggestive of incompetence. The Court of Appeals found, for example, that Respondent's refusal to offer mitigating evidence at the sentencing stage of his trial and his performance of a mock wedding ceremony before the sentencing jury showed at least the possibility of his incompetence. But Petitioner sees such behavior as instead an example of Respondent's "careful theatrics," a type of tactical maneuver which, if anything, shows Respondent to have been competent. [Ptn. at 15]

Were this Court now to engage in the comprehensive review of the record required to resolve which of the above assessments is correct, Respondent believes that the Court would agree with the Court of Appeals. But this Court, for good reason, "do[es] not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). The lessons that could be drawn from this Court's reappraisal of the facts here would likely not apply far beyond this one case. Indeed, they would not even resolve this case given the interlocutory nature of the Court of Appeals' order.

IV. PETITIONER PRESENTS NO REASON FOR THIS COURT TO EXERCISE ITS SUPERVISORY POWER TO REVIEW THE COURT OF APPEALS' DECISION TO ORDER A PARTIAL REMAND.

As a final ground for review, Petitioner seems to assert that the Court of Appeals for the Eleventh Circuit has run amok; he urges this Court to exercise its supervisory powers to restrain that court. Aside from innuendo, however, he makes absolutely no showing that the Court of Appeal has acted in any way improperly.

The object of Petitioner's hysteria is the Court of Appeals' decision to remand only the competency issue to the District Court while retaining jurisdiction over the remainder of the appeal. Petitioner puts a sinister, indeed wholly incredible, interpretation on this ordinary exercise of appellate discretion.[11/] First, he suggests that the partial remand ordered here is only the first in a "series" of successive partial remands contemplated by the Court of Appeals whose evident purpose[12/] will be to "protract . . . this litigation over a period of years." [Ptn. at 34].

Next, Petitioner argues that the Eleventh Circuit declined to issue a final judgment resolving all the issues in the appeal because it wished to "immunize itself from review by ignoring the binding authority of this Court in a series of 'interlocutory' orders which are capable of evading review." [Ptn. at 36-37] As in the case of his previous accusation, not a scintilla of evidence backs up this astoundingly irresponsible statement. A moment's thought would have informed Petitioner that the Court of Appeals, even if it wanted to, could not

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11/ Petitioner supports his attack on the Court of Appeal's "piecemealing" by citing Sanders v. United States, 373 U.S. 1 (1963), [Ptn. 33]. That case, in which this Court noted that habeas petitioners could be barred from later asserting grounds deliberately withheld in earlier petitions, obviously has no bearing on the Court of Appeals' action here.

12/ Respondent does not pretend to know precisely what guided the Court of Appeals. It seems possible, however, that it had at least the following purposes in mind. First, the competency claim is perhaps the strongest of the claims made in the Respondent's habeas petition; its resolution in his favor would make unnecessary decision of the numerous remaining claims. Second, the Court of Appeals had only a few months earlier reversed a district court decision in a companion case which also involved the issue of Respondents' competency. See Bundy v. Wainwright, 805 F.2d 948 (11th Cir. 1987). Proceeding in that case took place closely in time with those in this case; much of the evidence relevant to a determination of competency overlaps. The Court of Appeals likely believed that a partial remand would promote consolidation of the competency issues in both cases.

"immunize" from this Court its decision to order a competency hearing. If that hearing resulted in habeas relief - surely the only cause for Petitioner's concern -- this Court obviously could review not only the appropriateness of such relief but also the propriety of the decision to hold the hearing.

Petitioner has not cited a single case in which this Court has exercised its certiorari jurisdiction to review the appropriateness of a lower Federal court ordering a partial remand, simply because it was partial; Respondent is aware of none. The fantastic, irresponsible and thoughtless hypotheses Petitioner advances in the Petition provide no reason to deviate from the ordinary principles that counsel deference to the Court of Appeal's excercise of discretion.

CONCLUSION

For the reasons given above, this petition for certiorari should be denied.

Respectfully submitted,

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August 17, 1987

CERTIFICATE OF SERVICE

I, Andrew J. Munro, hereby certify that, on this 17th day of August, 1987, I caused to be delivered by first-class mail, postage prepaid, copies of the foregoing Motion for Leave to Proceed in Forma Pauperis and the attached Respondent's Brief in Opposition, to the following:

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